

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



74-2620

To be argued by:  
RICHARD G. ROSENBAUM

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Pgs  
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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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DOCKET NO.

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UNITED STATES OF AMERICA,

Appellee,

-versus-

PETER PLAGIANAKOS,

Appellant.

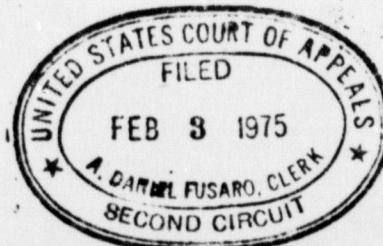
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On Appeal from the United States District  
Court for the Southern District of New York

APPENDIX OF APPELLANT

SCHECHTER & ROSENBAUM  
Attorneys for Appellant  
225 Broadway  
New York, N.Y. 10007.

RICHARD G. ROSENBAUM  
of Counsel



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**PAGINATION AS IN ORIGINAL COPY**

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## CRIMINAL DOCKET

JUDGE CANNELLA

74 CRIM. A 46

TITLE OF CASE	ATTORNEYS
THE UNITED STATES vs. PETER PLAGIANAKOS	For U. S.: Daniel J. Pykett, AUS 264-6394
	For Defendant: Schecter & Rosenbaum 225 Broadway N.Y.C. Tel. 962-1058

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DIS
(07) Fine,		1/1/74	Schecter	5	-
Clerk, 34		3/3/74	Treas.		3
Marshal,					
Attorney,					
XXXMXXXXXX 21					
XXXMXXXX 846,812,841(a)(1),(b)					
Consp. to viol. Fed. Narcotic Laws. (Ct. 1)					
Distr. & possess. w/intent to distr. Cocaine, II. (Cts. 2&3)					
(Three Counts)					

DATE	PROCEEDINGS
5-1-73	Filed indictment.
5-13-74	Deft. appears (no atty.) Adjourned to 5/20/74. Gurftein, J.
5-20-74	Deft. (atty. present) Pleads not guilty. Motions returnable in 10 days Bail fixed by Mag. continued (\$10,000. P.R.B. secured by \$1,000. cash) Case assigned to Judge Cannella for all purposes.
5-21-74	Gurftein, J.
5-30-74	Filed Govt's notice of readiness for trial.
6-10-74	Filed in Court notice of motion for order dismissing the indictment.

A2

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
5-30-74	Filed in Court affdvt.of Daniel J.Pykett,AUSA in opposition to motion to dismiss.		
6-5-74	Filed memorandum decision...On May 30-74 in open court the deft by his atty., submitted a motion to dismiss the indictment for failure to grant a speedy trial.***** Motion to dismiss the indictment against him for failure to grant a speedy trial is denied.....Cannella,J.....Mailed notice.		
6-19-74	Filed Govt's memorandum of law.		
6-19-74	Filed deft's memorandum in support of bill of particulars.		
6-19-74	Filed notice of motion for bill of particulars...With memo endorsed. Motion disposed of in accordance with rulings made on the record of May 30-74...Cannella, J...		
10-25-74	JURY TRIAL begun before CANNELLA, J.		
10-29-74	Trial cont'd. and concluded..Deft GUILTY on count 1 NOT GUILTY counts 2 & 3. P.S.I. ordered-Sent. 11-26-74 at 9:30 a.m. R.619 Bail cont'd...Cannella, J.		
10-30-74	Filed deft's requests to charge.		
10-30-74	Filed Govt's requests for the voir dire		
10-30-74	Filed Govt's requests to charge		
11-26-74	(# 74,918 ) Filed Judgment(Atty.Richard G.Rosenbaum,present)Imposition of sentence is suspended on count 1. Deft is placed on probation for a period of THREE YEARS, SUBJECT to the standing probation order of this Court..Deft is placed on Special Parole for a period of THREE YEARS, pursuant to Ti.21, U.S.Code, Sec. 841, and FINED \$2,500.00 on count 1. Fine to be paid during the course of his probation and parole, on such terms and conditions as the Probation Officer finds that he can afford to make.....Cannella, J....Ent.11-27-74-----		
11-26-74	Filed notice of appeal from judgment of Nov.26-74...Copy given to U.S.Atty. and deft at 687 E. 4th St. Bklyn,N.Y.		
11-26-74	Filed transcript of record of proceedings-dated Oct. 25, 24, 1974 (Continued on Page 2)		

A3

74cr.460

.3.

Cannella, J.

DATE

## PROCEEDINGS

1-2-75

Filed transcript of record of proceedings, dated NOV 26, 1974

Filed transcript of record of proceedings, dated MAY 30, 1974

1-11-75 PETER PLAGINAKOS - Filed the following papers received from Mar. Raby:

Docket entry sheet  
Criminal Complaint  
Disposition sheet  
Bond

12-13-74

Filed notice that the original record on appeal has been certified and transmitted to U.S.C.A.

Before: HONORABLE CHARLES J. HARTENSTINE  
United States Magistrate,  
Southern District of New York.

-----x  
UNITED STATES OF AMERICA :COMPLAINT

-v-

JOSEPH CASINO,  
ALVIN L. SIGALOW,  
PETER W. PLAGINAKOS, and  
JOHN J. MEROLA,  
Defendants . :  
-----x

: Violation of  
: 21 U.S.C. §§ 812,  
: 841(a)(1), 841(b)(1)(A)  
: and 846.

SOUTHERN DISTRICT OF NEW YORK, ss.:

ANDREW SMITH , being duly sworn,  
deposes and says that he is a Special Agent of the Drug  
Enforcement Administration, United States Department of  
Justice,

and alleges and charges as follows:

1. From on or about the 1st day of November, 1973  
and continuously thereafter up to and including  
the date of the filing of this complaint, in the Southern  
District of New York,

JOSEPH CASINO, ALVIN L. SIGALOW,  
PETER W. PLAGINAKOS, and  
JOHN J. MEROLA,

the defendants and others unknown, unlawfully, intention-  
ally and knowingly combined, conspired, confederated and  
agreed together and with each other to violate Sections  
812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States  
Code.

2. It was part of said conspiracy that the said  
defendants unlawfully, intentionally and knowingly would  
distribute and possess with intent to distribute Schedule  
I and II narcotic drug controlled substances the exact  
amount thereof being unknown in violation of Sections 812,  
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

A5

(1) Surveillance of the defendant CASINO exiting an automobile containing the defendants MEROLA and PLAGINAKOS, entering 333 E. 55th Street, exiting the apartment building at that address, and re-entering the above-mentioned automobile;

(2) Search of the person of the defendant CASINO upon his arrest approximately ten minutes after his leaving 333 E. 55th Street which established that he had approximately one ounce of cocaine in his possession;

(3) Search of Apartment 4-E occupied by the defendant SIGALOW, pursuant to a search warrant issued by Magistrate Jacobs, which established his possession of approximately one and one-half ounces of cocaine and cocaine cutting paraphernalia, including scales, cutting materials, and measuring spoons;

(4) Statements by the defendants SIGALOW and CASINO that SIGALOW sold the cocaine seized from CASINO's person to CASINO when CASINO entered 333 E. 55th Street; and

(5) Statement by the defendant MEROLA that he was aware that CASINO intended to purchase narcotics at the time the defendants PLAGINAKOS and MEROLA accompanied CASINO to 333 E. 55th Street.

OVERT ACTS

A6

1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 19th day of November, 1973 , in the Southern District of New York,

(a) the defendants JOSEPH CASINO, PETER PLAGINAKOS, and JOHN J. MEROLA drove to the area of 333 E. 55th Street;

(b) the defendants JOSEPH CASINO and ALVIN L. SIGALOW had a meeting in Apartment 4-E at 333 E. 55th Street.

The sources of deponent's information and the grounds of his belief are investigations conducted by him in the course of his official duties, including:

SEE ATTACHED SHEET

WHEREFORE, deponent prays that a warrant may issue for the apprehension of the above named defendant and that they may be arrested and imprisoned, or bailed, as the case may be.

Sworn to before me this  
20th day of November, 1973

H.A.S.H.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

A7

-----x  
UNITED STATES OF AMERICA : :

-v-

PETER PLAGIANAKOS, : :

INDICTMENT

Defendant. : :

74 Cr. 460

-----x  
FIRST COUNT

The Grand Jury charges:

1. From on or about the 1st day of October, 1973 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, PETER PLAGIANAKOS, the defendant and Joseph Casino and Alvin Sigalow named herein as co-conspirators and not as defendants and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.
2. It was part of said conspiracy that the said defendant unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

PETER PLAGIANAKOS delivered a package to co-conspirator  
Joseph Casino at 525 Hudson Street, New York, N.Y., and

A 8

2. On or about November 19, 1973 defendant

PETER PLAGIANAKOS rode in an automobile to First Avenue  
and 55th Street, New York, N.Y.

(Title 21, United States Code, Section 846)

SECOND COUNT

The Grand Jury further charges:

On or about the 7th day of November, 1973, in the  
Southern District of New York, PETER PLAGIANAKOS, the  
defendant, unlawfully, intentionally and knowingly did  
distribute and possess with intent to distribute a Schedule II  
narcotic drug controlled substance, to wit, approximately 26.5  
grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1)  
and 841(b)(1)(B).)

THIRD COUNT

The Grand Jury further charges:

On or about the 19th day of November, 1973, in the  
Southern District of New York, PETER PLAGIANAKOS, the defendant,  
unlawfully, intentionally and knowingly did possess with intent  
to distribute a Schedule II controlled substance, to wit,  
approximately one ounce of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1)  
and 841(b)(1)(B).)

for Curran

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FOREMAN

---

PAUL J. CURRAN  
United States Attorney

A9

1

1 sljp

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 UNITED STATES OF AMERICA, :  
6 Plaintiff, :

7 -v- : 74 CR. 460

8 PETER W. PLAGINAKOS, :  
9 Defendant. :

10 -----x

11 May 13, 1974  
12 10:30 a.m.

13 BEFORE:  
14

HON. MURRAY GURFEIN,

15 District Judge.  
16

17 APPARENCES:

18 PAUL J. CURRAN, ESQ.

19 United States Attorney for the  
Southern District of New York,  
BY: MICHAEL Q. CAREY, ESQ.,

20 Assistant United  
States Attorney  
21

22 (No appearance on behalf of the defendant.)  
23

24 ooo  
25

1 sljp

2 THE CLERK: Peter W. Plaginakos.

3 THE DEFENDANT: I don't have no counsel.

4 THE COURT: Is Mr. Plaginakos here?

5 THE DEFENDANT: Yes.

6 THE COURT: Do you have a lawyer?

7 THE DEFENDANT: No, I didn't get counsel.

8 THE COURT: What?

9 THE DEFENDANT: I didn't get counsel.

10 THE COURT: Can you afford a lawyer?

11 THE DEFENDANT: Yes.

12 THE COURT: What?

13 THE DEFENDANT: Yes.

14 THE COURT: Well, when do you expect to get one?

15 THE DEFENDANT: Well, I have a regular lawyer

16 that I have and I am just about getting him. I will have  
17 him next week.

18 THE COURT: Have you read the indictment?

19 Have you seen the indictment? Do you know what you are  
20 charged with?

21 THE DEFENDANT: No. I didn't think I needed a  
22 lawyer.

23 THE COURT: Well, you do need a lawyer. You  
24 need him badly because you are indicted for a serious  
25 crime.

All  
3

1 sljp

2 Do you think you can get a lawyer in a week?

3 THE DEFENDANT: I think so.

4 THE COURT: All right, let's put it on for next  
5 Monday, then.

6 THE DEFENDANT: Can I know what I am indicted  
7 for?

8 THE COURT: That would be the 20th.

9 MR. CAREY: Bail is currently set in the amount  
10 of \$10,000 personal recognizance bond secured by \$1,000  
11 cash. The Government would consent--

12 THE COURT: I will continue the bail and give  
13 a copy of the indictment to the defendant Plaginakos so he  
14 can show it to an attorney.

15 But you better get an attorney today or to-  
16 morrow so he can study it and by next week decide what he  
17 wants to do.

18 MR. CAREY: Your Honor, may the record reflect  
19 that I am giving the defendant a copy of the indictment?

20 THE COURT: Yes.

21 Now you understand that you are out on bail  
22 and if you fail to appear that is a Federal offense with  
23 a penalty up to five years.

24 THE DEFENDANT: Is that for next week?

25 THE COURT: I can't hear you.

A12

4

1 sljp

2 THE DEFENDANT: When do I reappear?

3 THE COURT: You reappear next Monday, the 20th,  
4 in this room. I will be here, but you be here with a law-  
5 yer.

6 THE DEFENDANT: Okay.

7 THE COURT: The record shows that he got a  
8 copy of the indictment.

9 All right.

10 (Adjourned to May 20, 1974, at 10:30 a.m.)

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

A13

UNITED STATES OF AMERICA

- v -

NOTICE OF MOTION

PETER PLAGIANAKOS,

74 Cr. 460

Defendant

: I R S :

PLEASE TAKE NOTICE that on the 12 day of June, 1974,  
the defendant will move this Court at a Motion part at the Court-  
house, Foley Square, New York, New York at 9:30 o'clock in the  
forenoon or as soon thereafter as counsel can be heard for an Order  
dismissing the indictment with prejudice on the grounds that the  
government has failed to be ready for trial within 6 months from  
the date of the arrest and from the filing of the initial complaint  
and in addition for such other and further relief as the Court  
may deem just and proper in the premises.

DATED: New York, New York

May 29, 1974

Yours, etc.

SCHRECHTER & ROSENBAUM  
Attorneys for defendant  
225 Broadway  
New York, New York 10007  
962-1058

TO: HON. PAUL J. CURRIN  
United States Attorney  
Foley Square  
New York, New York

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

A 13a

UNITED STATES OF AMERICA

- v -

AFFIDAVIT

PETER PLAGIANAKOS,

74 Cr. 460

Defendant

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

RICHARD G. ROSENBAUM, being duly sworn deposes and says:

That I am the attorney for the above named defendant and make this Affidavit in support of the annexed Motion to dismiss the indictment on the ground that the government has failed to proceed within 6 months of the date of arrest.

That upon information and belief the defendant was arraigned on November 19, 1973.

That on November 20, 1973 a complaint was sworn to and filed with the Magistrate which complaint charged the defendant with conspiring to distribute schedule I and schedule II substances. (copy of the said complaint is annexed hereto and made part hereof as Exhibit "A").

That on November 20, 1973, the defendant was brought before a United States Magistrate and bail was fixed.

That no indictment was handed down by the Grand Jury until May 3, 1974.

That the defendant was arraigned before the District Court on May 20, 1974 and on that day a plea of "not guilty" was entered.

A14

"In all cases the government must be ready for trial within 6 months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment) whichever is earliest".

That the 6 month period prescribed by the aforementioned rule has lapsed and it is evident that the government has not prosecuted this case with due diligence. By permitting almost 6 months to pass from the date of initial arrest before even an indictment is filed, the government has not timely apprised the defendant of the charges against him and thereby depriving said defendant of the opportunity to prepare a viable defense.

That at all times the defendant has made himself readily available to the Court and has appeared whenever called upon by the Court to do so.

That no delay has been occasioned by any acts of the defendant and your deponent is not aware of any justification for the inordinate delay.

That no previous application for the relief requested has heretofore been made.

WHEREFORE it is respectfully requested that the indictment and each and every Count therein be dismissed with prejudice.

Sworn to before me this

29th day of May, 1974

  
RICHARD G. ROSENTHAL

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

A15

----- x  
UNITED STATES OF AMERICA

:  
AFFIDAVIT

- v -

:  
74 Cr. 460

PETER PLAGIANAKOS,

:  
Defendant. :  
----- x

STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK)

DANIEL J. PYKETT, being duly sworn deposes and  
says:

That I am a Special Assistant United States Attorney  
in the office of Paul J. Curran, United States Attorney  
for the Southern District of New York.

This affidavit is submitted in opposition to the  
defendant's motion for an order dismissing the indictment on  
the grounds that the Government was not ready for trial  
within six months from the date of the arrest of the defendant.

The defendant was arrested on November 19, 1973.  
The indictment in this case was filed on May 3, 1974 and the  
case appeared on the court calendar for pleading on May 13,  
1974. At the time the defendant appeared for pleading, he  
did not have an attorney and the court, therefore, adjourned  
the pleading until May 20, 1974 and directed the defendant to  
return with an attorney. On May 20, 1974 the defendant  
entered a plea of not guilty and that same day the Government

A16

It is submitted that the extension of time granted by the court to permit the defendant to retain an attorney extended the Government's time under the six month rule by one week.

Rule 5 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases provides in part:

"In computing the time within which the government should be ready for trial . . . . The following periods should be excluded . . . .

g. The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel."

In addition, there were exceptional circumstances present in this case which required the Government to delay in presenting the case to the grand jury.

Rule 5(c)(i) permits an exclusion from the six months of the period during which evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period.

A17

defendant on November 19, 1973, in your deponent's opinion, further investigation of the case was needed if the Government was to prove the defendant guilty beyond a reasonable doubt. A portion of the necessary proof was obtained in February, 1974. It was not until April 11, 1974 when your deponent received additional information that in your deponent's opinion the case against this defendant was sufficient to prove guilt beyond a reasonable doubt. Shortly thereafter, the case was presented to the grand jury and an indictment was voted and filed.

WHEREFORE, your deponent prays that the instant motion be denied.

---

DANIEL J. PYKETT

Sworn to before me this  
day of May, 1974.

A18

1 MP

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 UNITED STATES OF AMERICA :  
6 versus :  
7 PETER PLAGINAKOS, : 74 Crim 460  
8 Defendant. :  
9 -----x

10 New York, N. Y.  
11

12 May 30, 1974 - 10:00 a.m.

13 Before

14 HON. MOHN M. CANNELLA,

15 District Judge.

16 APPEARANCES:

17 PAUL J. CURRAN, Esq.,  
18 United States Attorney for the Southern District  
of New York  
19 DANIEL PYKETT, Esq.,  
Assistant United States Attorney

20 RICHARD G. ROSENBAUM, Esq.,  
(225 Broadway, New York, N. Y.)  
21 Attorney for Defendant

22

23

24

25

1 MP

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A19

2 THE CLERK: United States of America versus Peter  
3 Plaginakos.

4 MR. PYKETT: Your Honor, Mr. Rosenbaum, who repre-  
5 sents the defendant, indicated he might be a little late. He  
6 had another matter, I believe before Judge Carter.

7 THE COURT: All right. We will wait.

8 (Pause.)

9 THE CLERK: United States of America versus Peter  
10 Plaginakos.

11 MR. PYKETT: Ready for the Government, your Honor.

12 MR. ROSENBAUM: Ready for the defendant. I apo-  
13 logise for being late, your Honor.

14 THE COURT: All right.

15 This appeared to be a matter where the indictment  
16 was filed on May 3, 1974, and on May 20th the defendant ap-  
17 peared in --

18 MR. ROSENBAUM: Your Honor, I believe this case  
19 began on November 19th, because according to my information  
20 the actual arrest occurred on November 19th, and according  
21 to the statute the six-month period runs from the initial  
22 proceeding.

23 THE COURT: Are you ready for trial now?

24 MR. ROSENBAUM: Well, I wouldn't be ready to pro-  
25 ceed today, because --

A20  
3

1 MP

2 THE COURT: Why not? You are complaining about ths  
3 six-months period, and I am prepared to try it right now, at  
4 two o'clock.

5 MR. ROSENBAUM: Well, Judge, I think that the spirit  
6 of the six-months ruling is for the purpose of permitting --  
7 so that the Government will handle cases expeditiously. Now,  
8 in this case, this thing was left to linger --

9 THE COURT: I am prepared to try it at two o'clock.  
10 Are you saying you are making a motion because there is a  
11 violation of the speedy trial rule? The motion is denied.  
12 Two o'clock.

13 MR. ROSENBAUM: Your Honor --

14 THE COURT: Two o'clock.

15 MR. ROSENBAUM: Excuse me, your Honor, May I submit  
16 my motion papers and have them become part of the file? I  
17 felt that I am obligated, as an attorney, under these circum-  
18 stances, to make such a motion.

19 THE COURT: Well, why didn't you make it? Why did  
20 you wait until now?

21 MR. ROSENBAUM: I just got the case. I was retained  
22 on --

23 THE COURT: You were retained on the 20th.

24 MR. ROSENBAUM: I have other cases.

25 THE COURT: Well, I am sorry you have other cases.

1 MP

2 You should have told him, "Look: I'm busy. Get somebody  
3 else."

4 MR. ROSENBAUM: Excuse me, Judge. I felt I was  
5 doing the right thing. I felt -- within ten days I have the  
6 motion papers prepared. It says it has to be on ten days'  
7 notice.

8 THE COURT: I hear oral motions in my part, and as  
9 far as I am concerned there is no need for papers at all under  
10 certain circumstances.

11 What is the basis of the motion you have now?

12 MR. ROSENBAUM: Well, the basis of the written  
13 motion is that the Government was not ready for trial within  
14 the six-month period. My affidavit cites --

15 THE COURT: All right. I am hearing the motion now.  
16 Hand up your papers.

17 What is the Government's answer to the motion?

18 MR. PYKETT: Your Honor, I would like to point out  
19 two things to the Court. One is that the indictment, as you  
20 mentioned, was filed on May the 3rd and appeared on the cal-  
21 endar on May the 13th for pleading. At that time the defendant  
22 appeared but did not have an attorney present, and the  
23 matter was therefore adjourned for one week, to May the 20th.,  
24 at which time he appeared with his attorney and entered the  
25 plea of not guilty.

1 MP

5

2 So in effect the adjournment for one week was for  
3 the benefit of the defendant and at the defendant's -- Well,  
4 I wasn't present, but I presume it was at his request, to get  
5 an attorney. It was at the Court's direction. But, in any  
6 case, that one-week adjournment, I believe, would extend the  
7 six-month period for one week from the standpoint of the  
8 Government's being ready for trial.

9 In addition to that, your Honor, there are some  
10 unusual circumstances here in this particular case that re-  
11 quired the Government to further investigate the case after  
12 the defendant's arrest prior to presenting this case to the  
13 grand jury, and under the circumstances I think that the  
14 Government should be permitted an extended period of time be-  
15 yond the six-month period, due to the extenuating circum-  
16 stances in the case.

17 I would be glad to submit an affidavit to your  
18 Honor with that detail.

19 THE COURT: All right. Submit an affidavit by two  
20 o'clock. This is put over until two o'clock this afternoon.

21 Two o'clock.

22 MR. ROSENBAUM: Your Honor, do you require the  
23 presence of the defendant at that time?

24 THE COURT: The defendant, as far as I am con-  
25 cerned -- my practice is that he is required to be here every

1 MP

2 single time the case is called, unless he files a waiver of  
3 appearance in writing. That is my practice, and if you have  
4 ever been here before me you know that, and if you haven't,  
5 you know it now.

6 MR. ROSENBAUM: I know it now.

7 THE COURT: I require his presence every time. As  
8 far as I am concerned, every appearance is a critical appear-  
9 ance.

10 MR. ROSENBAUM: All right. Then he will be here.

11 THE COURT: All right. He will be here.

12 As I told you, I am prepared to try the case. Now,  
13 what I have heard up to this point doesnot persuade me that  
14 I am going to grant your motion, and I am warning you to be  
15 ready to try the case.

16 MR. ROSENBAUM: Excuse me, your Honor, but I don't  
17 think that is the point. I think the point is that the whole  
18 purpose of the --

19 THE COURT: Now, don't be arguing your motion. I  
20 am going to decide the motion. I am telling you now that my  
21 opinion right now is that I am not going to grant it, and I am  
22 warning you and ordering you to be prepared to proceed.

23 MR. ROSENBAUM: Your Honor, if the motion is denied,  
24 I will not be ready for trial this afternoon.

25 THE COURT: Well, that's your headache. You have

1 MP

7

2 an order to be ready, and you are supposed to be ready, and  
3 you have to be ready.

4 MR. ROSENBAUM: Your Honor, the defendant was indicted  
5 ten days ago, and I just got the case, and I have prepared  
6 other motions, motions for a bill of particulars, with which  
7 I am ready to proceed.

8 THE COURT: Well, I am prepared to proceed on the  
9 bill of particulars now. Make your motion.

10 MR. ROSENBAUM: Your Honor, I am not prepared to  
11 try this case today. I haven't had any time to investigate  
12 this case --

13 THE COURT: I am ordering you to make your motion  
14 for a bill of particulars now. You say you have your papers  
15 prepared.

16 MR. ROSENBAUM: Yes; I do, your Honor. I will  
17 submit them right now.

18 THE COURT: Have you seen these papers at all, your  
19 Honor?

20 MR. PYKETT: No; I haven't, your Honor.

21 THE COURT: All right. We will put this over until  
22 two o'clock. Decide what you are willing to give him, and  
23 you will have a conference with him, and, as is the custom  
24 here, you will open up your file and give him whatever he  
25 needs. I don't know of any assistant who does otherwise.

1 MP

2 So go to his office and tell him what you need, and  
3 I will hear you again at two o'clock.

4 Do you have any other motions?

5 MR. ROSENBAUM: Not at this time. It will depend  
6 on the information I get from the Government.

7 THE COURT: All right. Then it's on for two o'clock  
8 for further proceedings.

9 MR. PYKETT: Thank you, your Honor.

10 - - -

11 (At 2:00 o'clock p.m.:)

12 THE COURT: There are two questions held over until  
13 now. One is the question of speedy trial, and the other is  
14 the question of a bill of particulars and for discovery.

15 As far as the speedy trial motion is concerned, it  
16 is denied, and I will file a memorandum indicating the reasons  
17 for the denial.

18 Now, how about the items on the bill of particulars?

19 MR. PYKETT: Yes, your Honor.

20 THE COURT: Have you come to any agreement on it?

21 MR. PYKETT: Yes, your Honor. We have come to an  
22 agreement on most of those matters. There are four or five  
23 requests which I have opposed, and I don't know whether coun-  
24 sel intends to pursue that further.

25 THE COURT: All right. You tell me the ones you still

1 MP

2 want, and I will rune on them.

3 MR. PYKETT: Your Honor, I marked it down as we  
4 went along over it. Perhaps I could --

5 THE COURT: Do I have a copy of this? Did you give  
6 me a copy of this motion?

7 All right. I have it here. Just a minute, and I  
8 will catch up.

9 All right. Which one are you talking about?

10 MR. PYKETT: The Government has opposed Request  
11 Number 4.

12 THE COURT: Let me get that page. I don't think I  
13 have that in front of me.

14 All right. Number 4: the name, address, date of  
15 birth of each and every civilian Government witness.

16 Denied.

17 MR. ROSENBAUM: Your Honor, may I be heard on that?

18 THE COURT: Go ahead. What case do you have that  
19 says that you are entitled to such information?

20 MR. ROSENBAUM: Let me explain the purpose.

21 THE COURT: Never mind the purpose. I want to know  
22 what citation you have that says you can get this information  
23 on the bill of particulars.

24 MR. ROSENBAUM: I don't have a particular citation.

25 THE COURT: Then go ahead and give me the argument.

2 MR. ROSENBAUM: Your Honor, first of all, the names  
3 and dates of birth are necessary for me to find out whether  
4 the particular witnesses have criminal records or not. In  
5 order for me to obtain the yellow sheets, they do require  
6 the name, at least, and the date of birth. As these witnesses  
7 testify, in order to impeach their credibility, I will need  
8 that information.

9 Mr. Pykett has offered to furnish me with what he  
10 has or what he can obtain concerning criminal records, but  
11 I am concerned if not all of that information is available to  
12 him.

13 And the second purpose for which I make that request  
14 is that I would like to request, whether through the machinery  
15 of the Court or through the machinery of the Government office,  
16 a chance to interview those witnesses, at least submit a  
17 letter which would be passed on to them.

18 THE COURT: What authority do you have for that?  
19 Let me see one case or rule that says you are supposed to do  
20 that. You are in effect telling me now that the Court is  
21 supposed to go into discovery with you and assist you on dis-  
22 covery.

23 MR. ROSENBAUM: Well, I only --

24 THE COURT: This is your job as a lawyer.

25 MR. ROSENBAUM: Well, the only case I have squarely

1 MP

2 in point is a State case from the Appellate Division, Second  
3 Department, the citation of which I don't have with me, but  
4 if your Honor can defer a ruling on that point --

5 THE COURT: They have different rules.

6 MR. ROSENBAUM: I understand.

7 THE COURT: Their rules are not the same as ours as  
8 far as witnesses are concerned.

9 MR. ROSENBAUM: No, but they do cite Federal cases  
10 and other rules which may induce your Honor to change your  
11 mind on that, and if I may ask you to deny it without preju-  
12 dice until I can submit authority --

13 THE COURT: All right. It is denied without pre-  
14 judice until you can submit authority.

15 What else have you got?

16 MR. PYKETT: Request Number 12, your Honor, is  
17 opposed.

18 THE COURT: Denied. Here again I am aware of no  
19 authority that goes this far as the language that is used  
20 in this particular request.

21 What is your next one?

22 MR. PYKETT: Request Number 14.

23 THE COURT: Denied. What is the next?

24 MR. PYKETT: Request Number 15 we have opposed as  
25 to that portion which asks us to disclose who was present

1 MP

2 at the delivery.

3 THE COURT: Do you have any authority for that?

4 MR. ROSENBAUM: Well, your Honor, first of all, on  
5 Request Number 15, it specifies that a certain overt act.  
6 took place, and if I am to properly prepare for a viable de-  
7 fense I should know where the overt act took place and who was  
8 present so that if the defendant can recall it at least he  
9 will have something to go on. And, you know, ordinary dis-  
10 covery --

11 THE COURT: How does Overt Act Number 2 read? Have .  
12 you got the indictment?

13 MR. PYKETT: On or about November 19, 1973,  
14 defendant Peter Plaginakos road in an automobile to First  
15 Avenue and 55th Street, New York, New York.

16 THE COURT: That portion is denied with an exception  
17 to the defendant.

18 Anything else?

19 MR. PYKETT: We have opposed 18 and 19.

20 THE COURT: What authority do you have for those?

21 MR. ROSENBAUM: Well, your Honor, first of all, you  
22 are asking me what authority I have.

23 THE COURT: Of course I am asking you that.

24 MR. ROSENBAUM: It's a proper --

25 THE COURT: I want to know where you have said that  
people before have said this is a proper request. If you can

1 MP

2 show me, I will read it. I am not aware of any.

3 MR. ROSENBAUM: I haven't had a chance, because  
4 this conference was called two days ago.

5 THE COURT: This is based on your own thinking,  
6 without having any authority for it? Is that what you are  
7 telling me?

8 MR. ROSENBAUM: Well, after the conference and  
9 those items which are denied, then I go and delve into it in  
10 more detail.

11 THE COURT: Well, you have to delve into it, as  
12 far as I am concerned. That is denied, since I know of no  
13 authority for that.

14 Now, this is Number 18?

15 MR. PYKETT: Yes, your Honor.

16 THE COURT: What is the next one?

17 MR. PYKETT: 19.

18 THE COURT: Denied. You will be afforded an oppor-  
19 tunity to cross-examine the witnesses called by the Government  
20 and ask those questions in open court.

21 Any others?

22 MR. PYKETT: The balance of the requests, your  
23 Honor, we have come to some agreement on. We haven't agreed  
24 as set forth exactly, but I think we can work out the balance.

25 THE COURT: Well, if you can't work out the balance,

1 MP

2 and if he is not satisfied within a week's time come back at  
3 any time and make an appointment with my clerk, and I will go  
4 over it again with you.

5 Now, when do you think you are going to be ready  
6 to try the case?

7 MR. ROSENBAUM: Well, your Honor, the defendant was  
8 arraigned ten days ago, and that's when I was retained, and  
9 I have not had a chance to go over the entire file. I haven't  
10 had a chance to make a complete investigation.

11 THE COURT: I am not asking you for your mental  
12 processes or what your problems are. I am trying to find  
13 out if you have a date in mind when you feel you can go to  
14 trial. That is what I am asking for.

15 MR. ROSENBAUM: I would feel, some time in July.

16 THE COURT: Well, I will put it down for the  
17 third week in June, and we will fix a trial date at that time.  
18 June 17th. We will fix a trial date at that time.

19 As I understand it, the Government is ready. In  
20 fact, they have been ready since May 20, 1974. The Court  
21 is ready, and we can proceed at the present time, except  
22 the defendant. -- I can understand why he can't, because he  
23 has not fully prepared the case, and he has not finished his  
24 discovery, but in the intervening time you ought to be able  
25 to correct all that.

1 MP

2 MR. ROSENBAUM: Yes, your Honor.

3 One more request, your Honor. When I get this  
4 material, I would like to have it in writing so I know what  
5 is left. I would also like to have the opportunity to submit  
6 a memorandum on those items of discovery which you have denied.

7 THE COURT: Submit them in seriatim, and I will  
8 rule on them; and it has to be done in the next five days or  
9 so; but I am not going to continue with that aspect of the  
10 case. I will rule on it at any time you come in, and if you  
11 want that, on one piece of paper set forth what items you agree  
12 with the U. S. Attorney on, and then put down the ones that  
13 are given and the ones that are denied, and I will sign it.

14 MR. ROSENBAUM: Very good.

15 THE COURT: I call to the U. S. Attorney's atten-  
16 tion the amended rules. I have just glanced at them. My  
17 clerk indicated to me that one portion of it which covers  
18 this name and address business of course isn't in effect yet.  
19 It will be effective August 1st. It makes provision for  
20 giving the name and address. So you better be prepared in  
21 the event I change my mind on that.

22 MR. PYKETT: Name and address of civilian Government  
23 witnesses.

24 THE COURT: There is the rule there, if you will  
25 read it. How does it read?

1 MP

2 THE CLERK: Upon the request of the defendant, the  
3 Government shall furnish to the defendant a written list of  
4 the names and addresses of all Government witnesses which  
5 the attorney for the Government intends to call in the pre-  
6 sentation of the case in chief, together with any records  
7 of prior felony convictions of any such witness which is  
8 within the knowledge of the attorney for the Government.

9 When a request for discovery of the names and ad-  
10 dresses of witnesses has been made by the defendant, the  
11 Government shall be allowed to perpetuate the testimony of  
12 such witnesses in accordance with the provisions of Rule 15.

13 This is proposed Rule 16(a)(1)(e), to become  
14 effective August 1st.

15 THE COURT: So that that is not in effect yet, but  
16 I may be persuaded when he comes in with those requests that  
17 he has that he can get that, so you be prepared in case he  
18 does.

19 Now, I think, although it doesn't mention it in  
20 there, that does not include cases where there may be pos-  
21 sible violence or other reasons why the names should not be  
22 given. You have to look into that aspect of it.

23 MR. PYKETT: Your Honor, for the record, may we  
24 ask that bail be continued?

25 THE COURT: Bail will be continued.

1 MP

2 MR. ROSENBAUM: Thank you very much.

3 Incidentally, I didn't have a crystal ball with  
4 respect to that proposed rule.5 THE COURT: You didn't have any authority at all.  
6 You operate by what is called among judges ipse dixit.7 MR. ROSENBAUM: Well, it wasn't quite that. I  
8 didn't expect to have a formal ruling made on the motion.9 THE COURT: But you are supposed to have a memoran-  
10 dum of law on those things.11 MR. ROSENBAUM: I have three things presently  
12 pending, on which I am running around, trying to file motions.13 THE COURT: Well, you are doing very well, so  
14 don't worry about it.

15 MR. ROSENBAUM: Good afternoon, your Honor.

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A35-

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA :

- against - :

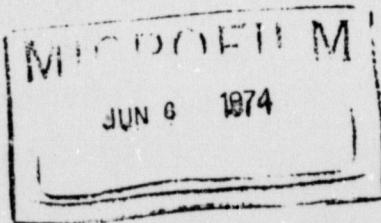
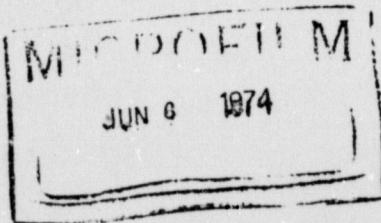
PETER PLAGIANAKOS, :

Defendant. : 74 Cr. 460  
(JMC)

-----X

CANNELLA, D. J.:

On May 30, 1974, in open court, the defendant, Peter Plagianakos, by his attorney, submitted a motion to dismiss the indictment against him for failure to grant a speedy trial. The notice of motion designated June 12, 1974 as the return date, however, at a pretrial conference previously scheduled for the morning of May 30, 1974 the Court directed the attorney for the government to return before the Court at 2 o'clock that afternoon and to bring with him whatever responsive matter the government desired to present on the motion. At the designated time, both counsel for the government and for the defendant, together with the defendant himself,



appeared before the Court and counsel for the government submitted an affidavit in opposition to the instant motion. After due consideration of both the moving and responsive papers, the Court, on the record, denied the instant motion to dismiss the indictment and indicated to counsel that a memorandum would subsequently be filed in order to specify the rationale for that decision. This, then, is such memorandum.

On a motion to dismiss an indictment for want of a speedy trial, it is incumbent upon the Court to "make findings of fact on the issues" raised by the defendant. United States v. Valot, 473 F.2d 667 (2 Cir. 1973); United States v. Scafo, 470 F.2d 748 (2 Cir. 1972), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 42 L.W. 3271 (1973); United States v. Aprea, 358 F.Supp. 1126 (S.D.N.Y. 1973). However, the Court need not embark upon an exact accounting of whether there was, at every moment from the date of arrest, in fact and in effect a tolling of the six month rule. Fed.R.Crim.P. 50(b), Plan for Achieving Prompt Disposition of Criminal Cases (S.D.N.Y.), Rule 4 [hereinafter "Speedy Trial Rules"]; United States v.

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Rollins, 475 F.2d 1108 (2 Cir. 1973); United States v.  
Aprea, supra, 358 F.Supp. at 1127. It is sufficient  
for purposes of the instant motion that the Court find  
facts which either demonstrate or fail to demonstrate  
that the six month rule has been violated, and if it  
finds that a violation has occurred, whether or not  
such delay comes within one of the exceptions specified  
in Rule 5 of the Speedy Trial Rules. Id. The rule  
governing the instant case, Rule 4 of the Speedy Trial  
Rules, provides, in pertinent part:

In all cases the government must be  
ready for trial within six months from  
the date of arrest, service of summons,  
detention, or the filing of a complaint  
or of a formal charge upon which the  
defendant is to be tried (other than a  
sealed indictment), whichever is earliest.  
If the government is not ready for trial  
within such time, and if the defendant is  
charged only with non-capital offenses, the  
defendant may move in writing, on at least  
ten days' notice to the government, for  
dismissal of the indictment.<sup>1/</sup>

The following facts, which are found in the  
Court Record of this Case, are dispositive. The defendant  
was arrested on November 19, 1973. On November 20, 1973

a complaint was filed charging him with violations of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) and 846. On that date defendant was presented before Magistrate Charles J. Hartenstine of this District and advised of his rights. At that time, the defendant indicated to the Magistrate that he would retain his own counsel. Bail was fixed by the Magistrate at a \$10,000 personal recognizance bond secured by \$1,000 cash. Defendant made bail on November 23, 1973.

Thereafter, on May 3, 1974, the instant indictment was filed charging defendant with the crimes alleged in the November 20, 1973 complaint. The case was placed on the Part I calendar for pleading on May 13, 1974, on which date the defendant appeared without an attorney, causing Judge Gurfein to adjourn the matter, for purposes of pleading, until May 20, 1974. On May 20, 1974, defendant appeared with an attorney and entered a plea of not guilty to the indictment. On that same day the government filed a notice of readiness for trial and was, in fact, ready for trial. Thus, on these facts, the six month period specified in

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Rule 4 commenced on November 19, 1973, the date of defendant's arrest, and continued until May 20, 1974, the date on which the government filed its notice of readiness.

The present Speedy Trial Rules are promulgated pursuant to the provisions of Fed.R.Crim.P. 50(b) <sup>2/</sup> and, therefore, are subject to the provisions of Fed.R.Civ.P. 45(a). Rule 45(a), in turn, provides, inter alia, that:

In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday.

Rule 4 of the Speedy Trial Rules compels the government to be ready for trial within six months of, inter alia, the date of arrest, or, as applied to the present case, six months from November 19, 1973. This the Court finds the government to have done. Employing the method of computing time set forth in Fed.R.Crim.P. 45(a), the six month period here involved expired on May 19, 1974.

A40

3/

Cf., New York General Construction Law § 30. The calendar, however, reveals that May 19, 1974 was a Sunday and, therefore, pursuant to the terms of Rule 45(a), the involved six month period was continued until "the end of the next day", May 20, 1974. As above indicated, the government, on May 20, 1974, filed an appropriate notice of readiness for trial, thereby complying fully with the provisions of Speedy Trial Rule 4 and requiring the denial of the instant motion.

4/

Additionally, owing to the fact that lawyers and judges are notoriously inept mathematicians, the Court concludes that, assuming arguendo the six month period had, in fact, expired prior to the filing of the notice of readiness by the government, the instant motion must be denied because of the provisions of Rule 5(g) of the Speedy Trial Rules. Rule 5(g) provides, in pertinent part:

In computing the time within which the government should be ready for trial under Rules 3 and 4, the following periods should be excluded: . . .

A41

(g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

On the facts of the present case, as recited above, the arraignment of the defendant on this indictment was adjourned from May 13, 1974 to May 20, 1974 because of his appearance on the earlier date without counsel. On the adjourned date, May 20, 1974, defendant appeared with an attorney and entered a plea of not guilty. The government filed its notice of readiness for trial at <sup>5/</sup> the earliest possible moment thereafter. On these facts, the Court concludes that even had the six month period expired, of its own course, prior to the government's filing of the notice of readiness on May 20, 1974, the seven-day period from May 13 to May 20, 1974 is properly excludable from the Rule 4 period pursuant to the terms of Rule 5(g). Cf. United States v. Altro, 358 F.Supp. 1034, 1040 (E.D.N.Y. 1973).

For the reasons hereinabove stated, defendant's

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motion to dismiss the indictment against him for  
failure to grant a speedy trial is denied.

SO ORDERED.

John M. Cannella  
JOHN M. CANNELLA  
United States District Judge

Dated: New York, N. Y.  
June 5, 1974.

A43

1/ It is to be noted that the present Rule 4 is to be construed in a fashion similar to that which was accorded to its predecessor under the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases. See, United States v. Bowman, 493 F.2d 594, 595-596, n. 3 (2 Cir. 1974).

2/ See, e.g., United States v. Cacciato, 487 F.2d 240, 243 (2 Cir. 1973).

3/ Section 30 of the New York General Construction Law provides that:

A number of months after or before a certain day shall be computed by counting such number of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order in days of the months as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted.

4/ It is now well settled under the Speedy Trial Rules that the government is barred from filing a notice of readiness until after such time as the defendant has entered a plea.

Our purpose [in United States v. Valot] was to insure that the government would file its notice of readiness only after pleading and that, absent exceptional circumstances permitting an extension of time pursuant to

A44.

Rule 5(h), this must be done within the six-month period following arrest, after excluding any other periods as authorized by Rule 5. Even though the government might be ready to go to trial at an earlier date, its readiness could not become effective as a practical matter until issue had been joined, whereupon the case could be assigned to a judge for all purposes, including the disposition of pretrial motions and the conduct of the trial itself.

United States v. Bowman, 493 F.2d 594, 597 (2 Cir. 1974). See also, United States v. Valot, 473 F. 2d 667 (2 Cir. 1973).

5/ Id.

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JGE:cf  
73-3729

REQUEST NO. 3

The Conspiracy Count

Now let us turn to Count One, the conspiracy charge.

The conspiracy charge is entirely separate and distinct from the charge made in the substantive counts. This fact, however, does not preclude you from considering proof of a substantive offense as evidence that a conspiracy existed. Before you may convict the defendant under this count, the following essential elements must be established beyond a reasonable doubt:

First: You must be satisfied that the conspiracy charged did in fact exist, i.e., that sometime between October 1, 1973 and May 3, 1974, the date this indictment was filed, an agreement existed between the defendant on trial and any other co-conspirator whether or not on trial or named in the indictment.

Second: That it was part of the agreement to accomplish one or more of the following objects:

1 wclm

Casino-direct

A46  
37

2 Did there come a time when Agent Shea called you  
3 again?

4 A Yes.

5 Q What time was this, approximately?

6 A I believe it was around 4:00 in the afternoon.

7 Q What did you say to him and he to you?

8 A I told him I had not been able to get it yet and  
9 that it would take me a little while. That's about all I  
10 remember. I told him I would probably get it by 6:00.

11 Q I show you what has previously been marked Govern-  
12 ment's Exhibit 3510 and ask you if that changes your answer  
13 about what you told Agent Shea?

14 MR. ROSENBAUM: Objection.

15 THE COURT: I would invite him to do this if I  
16 were you. If he changes his answer every other minute, it  
17 seems to me that he -- if you want this kept out, fine.

18 MR. ROSENBAUM: Withdrawn, your Honor.

19 THE COURT: Fine.

20 A It's the same thing. I couldn't get anything yet  
21 and it would take me at least two hours. It was 4:00. It  
22 would be about 6:00.

23 Q Did you tell him anything else?

24 A "I can't hook up anything in your price range for  
25 at least two hours," is what I said.

1 wclm

Casino-cross

2 A They said it would go easier on me if I cooperated  
3 to the fullest extent.

4 Q And "to the fullest extent" meant bringing in Mr.  
5 Plagianakos, didn't it?

6 A They wanted -- actually they wanted me to set  
7 somebody up or set up Plagianakos -- sell some drugs to him.

8 Q They wanted you to set up Plagianakos?

9 THE COURT: No, he didn't say that. They wanted  
10 him to set up someone who would in turn --

11 MR. ROSENBAUM: Sell drugs to Plagianakos.

12 THE COURT: That's right.

13 Q Did there come a time when somebody from the Drug  
14 Enforcement Administration, either in December or January,  
15 told you that you weren't cooperating with them?

16 A Yes.

17 Q Did they intimate to you that if you didn't cooper-  
18 ate with them, you would end up going to jail?

19 A They said that they would tell the judge that I had  
20 not cooperated.

21 Q And you felt that if they told the judge that, that  
22 you would end up with a prison sentence, didn't you?

23 A I couldn't describe my feeling exactly like that.

24 Q You were fearful of a prison sentence, were you  
25 not?

1 wclm Casino

2 That is what I have been trying to find out.

3 A Yes.

4 Q Well, what would he get?

5 A If I made 300, I would have gave him 150.

6 Q And was that by an agreement or is that what you  
7 had in your mind?

8 A Sort of what I had in my mind. The agreement --  
9 there was no agreement. It was, like, very casual.

10 Q Did you ever give him a nickel for lending you  
11 the money to buy cocaine at any time?

12 A When I was arrested, I owed him money.

13 Q I am not talking about what you owed him. I am  
14 talking about: Did you physically ever give him a nickel  
15 for any of this money that you say you borrowed from him?

16 A No, sir.

17 Q But you say you owed it to him.

18 A Right.

19 MR. EPSTEIN: Your Honor, I think I could perhaps  
20 clarify this a bit with a couple of questions.

21 THE COURT: You may be able to clarify it, but I  
22 don't know what you are talking about -- clarifying it.

23 He has testified as to the facts as he understands  
24 them.

25 Go ahead. Do whatever you want.

1      wc

Charge of the Court

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2      a verdict.)

3                THE COURT: Mr. Rosenbaum, would you just look at  
4      that and make sure that it is a conformed copy of the  
5      indictment before we give it to the jury.

6                MR. ROSENBAUM: Yes.

7                MR. EPSTEIN: This morning I handed to Mr.  
8      Rosenbaum Government's Exhibits 3519, report by Agent  
9      Caraviotis, of 11/27/73; Government's Exhibit 3520, agency  
10     report of 11/29/73; Government's Exhibit 3521, another  
11     agency report of 11/29/73; Government's Exhibit 3522, agency  
12     report of 12/11/73; Government's Exhibit 3523, grand jury  
13     testimony of Agent Siegel on 5/3/74; Government's Exhibit  
14     3524, laboratory report of 11/14/73; Government's Exhibit  
15     3525, laboratory report of 11/27/73; and Government's Exhibit  
16     3526, lab report of 12/26/73.

17                (Recess)

18                (At 5:05 p.m., jury not present)

19                THE COURT: Bring in the jury. I have a note  
20      from the jury which says: "Can't reach verdict." So I  
21      intend to use the Allen charge, which has been approved by  
22      the district, a modified Allen charge.

23                MR. ROSENBAUM: Your Honor, may I take my exception  
24      to that charge in advance?

25                THE COURT: What do you suggest we do, then?

1      wc

Charge of the Court

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2                THE FOREMAN: No, we wanted the testimony.

3                THE COURT: There is testimony on November 7, 1973.

4                I will have the reporter start from the beginning of Agent  
5                Siegel's testimony, and you tell us when to stop reading.

6                THE FOREMAN: I can tell you what they want.

7                Some information -- wait a minute, what was that? -- they  
8                wanted to know where he came from, where he started to follow  
9                Pete.10               THE COURT: All right. We will have it read to  
11               you and then you can make up your own mind.

12               (Portion of testimony of Mr. Siegel read.)

13               THE COURT: Do you want to hear that also?

14               THE FOREMAN: I think that is what they want. Up  
15               to that point.16               THE COURT: Is there anyone who wants to hear  
17               anything further? All right, thank you. You may retire.  
18               As a matter of fact, the marshal is going to take you out to  
19               supper now, so that you can continue to deliberate until such  
20               time as the arrangements are made, and then continue on  
21               afterwards, if necessary.

XXX

22               (Note marked Court's Exhibit 2.)

23               (Recess)

24               (At 8:10 p.m., jury present)

25               THE COURT: I have a note from the jury, which

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2      reads as follows:

3                "Define conspiracy as it applies to this case."

4                Conspiracy is defined by Congress in a general  
5      statute, which Congress passed, in the following fashion:

6                "If two or more persons conspire to commit an  
7      offense against the United States"-- and in this particular  
8      case the offense against the United States which we are  
9      talking about is to violate the Narcotics Control Act, and  
10     that is that you may not distribute or possess with intent  
11     to distribute a controlled drug, which cocaine is; that is  
12     the law we are talking about -- "and one or more persons do  
13     any act to effect the object of the conspiracy, each is guilty  
14     of a crime." That means each person who is involved in that  
15     is guilty of a crime.

16               So, in order to establish a conspiracy, what do  
17     you have to show? You have to show, first, that there was  
18     more than one person, at least two persons or more. Here  
19     the Government has alleged that there were three persons,  
20     in addition to some persons unknown to the grand jury, the  
21     three persons being the defendant, the witness Casino, and  
22     Sigalow, the source of supply of the narcotics.

23               If you find from examining the evidence that  
24     there was an agreement between these three persons and any one  
25     did an act to further the purposes of that agreement, then

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2 that is the completion of the conspiracy and it has been  
3 proven against every one who you find was a member of it  
4 knowingly, willfully and unlawfully.

5 It is not necessary that the persons who are  
6 involved in the conspiracy meet together and enter into an  
7 express or formal agreement or that they state in words or  
8 in writing what the scheme was or how it was to be effected.  
9 It is sufficient to show that they tacitly came to a mutual  
10 understanding to accomplish an unlawful purpose in violation  
11 of the Narcotic Control Act.

12 In the context of this case, if you believe the  
13 evidence beyond a reasonable doubt that one fellow furnished  
14 the money, the other fellow got the customers, and the  
15 third fellow was the source of supply, and you are convinced  
16 of that beyond a reasonable doubt, then that would show an  
17 agreement, even though they never stated it in so many words.  
18 Because such an agreement may be inferred from the circum-  
19 stances and conduct of the parties.

20 In determining whether the evidence establishes  
21 the existence of a conspiracy, you should consider the acts  
22 and declarations of all the alleged participants, and in  
23 determining whether a particular defendant is a member of  
24 the conspiracy, you also consider the acts and declarations  
25 of the parties.

2 You will recall that Casino indicated here in  
3 his testimony what his understanding of the agreement was,  
4 what he was supposed to do, and what the other parties were  
5 supposed to do. So that if you find that beyond a reasonable  
6 doubt, that would spell out the existence of the conspiracy  
7 and it would spell out the parties that were involved in it.

8 To be a member of the conspiracy the defendant  
9 need not know all of the other members nor all of the details  
10 of the conspiracy nor the means by which the objects were to  
11 be accomplished. Each member of the conspiracy may perform  
12 separate and distinct acts.

13 Here it is the Government's claim -- and if you  
14 find it is so beyond a reasonable doubt, it would establish  
15 the relative positions of these parties -- that this defendant  
16 is supposed to have furnished the means and the money with  
17 which to buy the material, Casino is the man that got the  
18 customers, and Sigalow was the source of supply or the contact.

19 The extent of the defendant's participation is  
20 not determinative of his guilt or innocence. A defendant may  
21 be convicted as a conspirator even though he plays a minor  
22 part in the conspiracy. His final stake, if any, in the  
23 venture is a factor to be considered in determining whether  
24 a conspiracy existed and whether the defendant was a member  
25 of it.

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2            It is up to you to draw inferences from evidence  
3      that is in the case, and you can determine whether or not  
4      this defendant was in this picture to help it succeed and  
5      whether or not he was a participant, as the Government  
6      claims, or was he simply a fellow that was hanging around,  
7      happened to have been there and happened to have associated  
8      with him, as the defendant lawyer has indicated to you in  
9      his summation. This is the nub of the case, actually.

10           Of course, the Government has indicated to you a  
11      large number of circumstances which they would suggest to  
12      you -- and you don't have to buy this, but if you find it  
13      is based on the facts you may buy it -- clearly indicate that  
14      he was not merely a participant, namely, why did he hold  
15      that ounce of drugs when Casino brought it back and he said  
16      to him in effect, "Don't you hold it, because you'll use it  
17      and there goes the stuff or the thing," as he called it --  
18      I don't remember what the expression was that was used. In  
19      addition to that, how come he happened to be there at the time  
20      that these things are happening? How come that the car  
21      happens to be registered in an address where he lives, where  
22      he goes down to Seagate? And various other items of that kind

23           The defendant would suggest to you that that is  
24      coincidental; that these things are not indications of guilt  
25      in and of themselves, except possibly for the alleged

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2 possession of the ounce of cocaine when Casino returned it  
3 to him. But all the other items he suggests are all capable  
4 of innocent interpretation. Of course, this is the very  
5 thing that you have to decide.

6 If it is established beyond a reasonable doubt  
7 that a conspiracy existed -- and certainly if you take the  
8 testimony of Casino and you believe that he had a source of  
9 supply from whom he bought, there was at least a conspiracy  
10 as between those two -- the question is whether the defendant  
11 was in it. That is another question. But there you have  
12 at least two people who are acting in a manner that seems to  
13 indicate that a conspiracy existed. That, of course, does  
14 not answer the question about the defendant being a member  
15 of it, but at least it answers the question whether or not  
16 there was a conspiracy which was in existence.

17 I will repeat that. If it is established beyond  
18 a reasonable doubt that a conspiracy existed and that the  
19 defendant was one of its members -- which is the crucial  
20 issue here; was he one of its members -- then the acts and  
21 declarations of any other member of such conspiracy in or  
22 out of the defendant's presence, done in furtherance of  
23 the objects of the conspiracy and during its existence, may  
24 be considered as evidence against the defendant. When men  
25 enter into an agreement for an unlawful purpose, they become  
the agents for one another.

2            In other words, it is like a criminal partnership.  
3    All the partners are responsible for the acts of everybody  
4    that is in the partnership, whether they are there or are not  
5    there or whether they know about it or don't know about it.  
6    It is a criminal partnership.

7            Of course, the question of the overt act: there  
8    must be an overt act. And the overt act can be a legal  
9    act. It does not have to be a criminal act. For example,  
10   if two people were going to rob a bank, and one fellow says  
11   to the other, "Well, you bring a car and I'll bring a flash-  
12   light, and I'll meet you tomorrow night in front of the  
13   bank." Now, one fellow can go and get a flashlight in the  
14   five-and-ten. That is not an illegal act. Anybody can buy  
15   a flashlight in the five-and-ten. But when the flashlight  
16   is going to be used in furtherance of the robbery, that  
17   overt act, which is an entirely legal overt act, is  
18   sufficient to make out the conspiracy. It is the last item  
19   that is necessary in a conspiracy: an agreement to violate  
20   federal law and an act done in furtherance of it. That is  
21   the overt act.

22           So, in the last analysis, if you find beyond a  
23   reasonable doubt that a conspiracy existed to violate the  
24   Federal Narcotics Control Act and that the defendant knowingly  
25   and willfully was a member of the conspiracy, with an intent

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2       to further its objectives, and that during its existence  
3       an overt act which is alleged in the papers was knowingly  
4       done by one or more of the conspirators in furtherance of the  
5       conspiracy, and that the defendant knew that the violations  
6       which were executed by the members of the agreement were  
7       violations of the Federal Narcotics Control Act, then each  
8       one of them that is in it at that time would be guilty of this  
9       charge. This all must be by evidence which convinces you  
10      beyond a reasonable doubt. That is generally the law as it  
11      applies to this area.

12                  You may retire.

13                  (At 8:20 p.m., the jury retired to deliberate  
14      further.)

XXX 15                  (Note marked Court's Exhibit 3.)

16                  MR. ROSENBAUM: Your Honor, may I make an  
17      objection for the record. I felt that during your explanation  
18      of the conspiracy charge you also discussed what allegedly  
19      transpired during the case and that you commented on the  
20      evidence.

21                  THE COURT: Give me the paper. Did you hear what  
22      the note said?

23                  MR. ROSENBAUM: They wanted to know what conspiracy  
24      was.

25                  THE COURT: "Define conspiracy as it applies to ,

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2       this case." I cannot define conspiracy in a vacuum when they  
3       ask me to apply it to this case. Your exception is noted,  
4       and I don't see that there is anything I need do about it,  
5       because that is all I did. But you have an exception to the  
6       Court's ruling.

7                    MR. ROSENBAUM: Thank you.

8                    (Recess)

9                    (At 8:45 p.m., jury present)

10                  (Jury roll called - all present.)

11                  THE COURT: I have a note from your jury foreman  
12       which reads as follows:

- 13                  1. Guilty.  
14                  2. Not guilty.  
15                  3. Not guilty.

16                  I am going to ask the clerk of the court to poll  
17       each one of you, and when you are polled and your name is  
18       called, you will indicate whether this is your verdict --  
19       guilty on Count 1 and not guilty on Counts 2 and 3. If  
20       that is your verdict, you will simply say yes; if it is not,  
21       you will answer no.

22                  (Each juror, upon being asked by the Clerk "Is  
23       that your verdict?", answered in the affirmative.)

24                  THE COURT: All right. The verdict will be  
25       recorded as indicated.

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2            I have never commented on a jury verdict in the  
3       twenty-six years I have been a judge, for the simple reason  
4       that I feel that when the jury delivers a verdict in  
5       accordance with its conscience, there is no one that can  
6       quarrel with it. However, I do thank you on behalf of the  
7       Court. You did discuss this case to the fullest extent and  
8       you did give it the importance that it merited. I appreciate  
9       the manner in which you served on this jury.

10            (The jury left the courtroom.)

XXX    11            (Note marked Court's Exhibit 4.)

12            THE COURT: Mr. Rosenbaum, are you going to  
13       reserve your motions until the time of sentence, or do you  
14       want to make them now?

15            MR. ROSENBAUM: I would prefer to reserve them  
16       until the time of sentence, your Honor.

17            THE COURT: All right. Then sentence November 26,  
18       1974, and we will be in what room?

19            THE CLERK: 619, Judge.

20            THE COURT: Room 619. What are the present bail  
21       conditions?

22            MR. EPSTEIN: Your Honor, it is \$10,000 personal  
23       recognizance bond secured by \$1,000 cash.

24            THE COURT: I would imagine he has roots, he has  
25       a family, he has a baby.

PAUL J.

